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No. 03-956

In The

Supreme Court Of The United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the courts below correctly applied the directly controlling precedent of *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), to a record that those courts determined, as a matter of fact, "presented no evidence that the defendants applied Connecticut's Gay Rights Law in a viewpoint discriminatory manner." *Boy Scouts of America v. Wyman*, 335 F.3d 80, 97 (2d Cir. 2003).

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COUNTERSTATEMENT OF THE CASE

The opinion of the Court of Appeals for the Second Circuit and the record in this case contain important facts that have been omitted from the Petition. Those facts are as follows:

The State of Connecticut conducts an annual workplace charitable campaign ("Campaign"), as provided by the legislature under Conn. Gen. Stat. § 5-262.[1] *Boy Scouts of America v. Wyman*, 335 F.3d 80, 84 (2d Cir. 2003); Petitioners' Appendix (Pet. App.) 5a. The Campaign is administered by a committee whose membership is set by statute and includes State officers, employees and retirees, who comprise the only voting members of the committee. *Id.* The Campaign is conducted during business hours in State offices by State employees, who, among other things, distribute a campaign directory in booklet form, listing and describing the organizations in the Campaign. The State pays the salaries of committee members and other "loaned" State employees who conduct the Campaign during usual business hours. *Id.*; Conn. Agencies Regs. § 5-262-2; Resp. App. 7-A.

State employees may make contributions to the Campaign by authorizing a deduction from the bi-weekly payroll. The State Comptroller processes the deductions and transmits the sums deducted to a fund-raising organization, normally a United Way, which administers the collected Campaign monies. Conn. Gen. Stat. § 5-262(e); Resp. App. 4-A.

Connecticut law requires that all participants in the Campaign maintain a written policy of non-discrimination,

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[1] *See* Respondents' Appendix (Resp. App.) at 2-A.

including non-discrimination based on sexual orientation. 335 F.3d at 84; Pet. App. 6a; 63a. The petitioners, Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America (collectively "BSA"), have conceded that this provision is facially neutral. *See* Brief for Appellant at 35, *Boy Scouts of America, et al. v. Wyman, et al.*, 335 F.3d 80 (2d Cir. 1993)(No. 02-9000). Organizations participate in the campaign through "federations," which apply on behalf of the federations' members. Conn. Gen. Stat. § 5-262(1); Resp. App. 2-A; Conn. Agencies Regs. § 5-262-4; Resp. App. 7-A. In furtherance of the non-discrimination requirement, state regulations require the filing of an application by each parent federation that wishes to participate in the Campaign. 335 F.3d at 84; Pet. App. 6a; Conn. Agencies Regs. § 5-262-4; Resp. App. 7-A. Each federation must attest to the fact that each of its member organizations has an individual written policy of non-discrimination. That attestation is based on each member's individual Campaign application, which is filed with the federation. 335 F.3d at 84; Pet. App. 6a. The Campaign committee reviews all applications for compliance with State law, including, but not limited to, the non-discrimination requirement. *Id.* State law provides for removal of a parent federation or its members for failure to adhere to any of the eligibility requirements. *Id.*; Conn. Agencies Regs. § 5-262-5; Resp. App. 11-A. During the campaign in question, the committee excluded 29 other organizations because they did not establish compliance with the non-discrimination requirement. *Boy Scouts of America v. Wyman*, 213 F.Supp. 2d 159, 164 (D.Conn. 2002); Pet. App. 41a.

In its applications to participate in the Campaign, the BSA averred that it had a written policy of non-discrimination. 335 F.3d at 85; Pet. App. 6a-7a. However, after the Connecticut Commission on Human Rights and Opportunities ("CHRO"), in an unsolicited letter, informed

the Campaign committee that the New Jersey Supreme Court had ruled that the Boy Scouts practiced discrimination, the Campaign committee requested a clarification from the BSA of its attestation of a non-discrimination policy. 335 F.3d at 85; Pet. App. 7a. In a letter from the Scout Executive of the Boy Scouts' Connecticut Rivers Council, the BSA stated that "[i]f an individual does indicate that they [sic] are homosexual we can not register them." *Id.*

Because it was faced with the possible conflict between the BSA's original certification and its subsequent letter, the Campaign committee reached out for guidance from the CHRO, the state agency delegated the responsibility for enforcing and interpreting the state's anti-discrimination laws. The Campaign committee requested a declaratory ruling on whether the BSA's continuance in the Campaign would place the State in violation of any non-discrimination statutes that are directly applicable to activities conducted by the State. 335 F.3d at 85-86; Pet. App. 8a. While the BSA mischaracterizes the CHRO's and the committee's actions during this process as hostile toward the BSA's viewpoint, both the District Court and Court of Appeals, in its *de novo* review of the record created by the parties on summary judgment, determined that there was no evidence to support these characterizations. 335 F.3d at 96; Pet. App. 28a.

The CHRO ultimately ruled that if the BSA were retained in the Campaign, the State would be in violation of Connecticut's Gay Rights Law, which prohibits the State from becoming a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination. Based upon the CHRO's declaratory ruling, the executive director of the committee, on advice of counsel, notified the BSA that it would not be able to participate in the Year 2000 Campaign. 335 F.3d at 86; Pet. App. 9a. The

removal was ratified by the committee.[2] A-274 and A-279[3] reprinted at Resp. App. 12-A to 14-A. The committee took no action to remove the BSA from the ongoing Year 1999 Campaign. A-297; Resp. App. 20-A.

In reviewing the organizations included in the Campaign, the Court of Appeals determined that there was no evidence in the record that any of those organizations, other than the petitioners, had discriminated in their membership or hiring policies with respect to sexual orientation or on any other basis. The Court stated:

> What the BSA gives us is a list of organizations that, by their names, would appear to target their *services* to persons of specific races, ethnicities, sexes, ages or sexual orientations. Despite being given ample opportunity to do so, however, the BSA presents no evidence that these groups actually have policies of discrimination or do discriminate in the provision of services. More significantly, the BSA fails to point to the slightest indication that these groups discriminate in their *membership or employment policies*, as opposed to their policies in providing services. [footnote omitted.] . . . We conclude that the BSA has presented no evidence that the defendants applied Connecticut's Gay Rights Law in a viewpoint discriminatory manner.

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2 The petitioners' statement that no vote was taken by the Committee to oust the BSA is therefore erroneous. *See* Petition at 7.

3 Numbers preceded by "A" refer to pages in the Joint Appendix submitted to the Court of Appeals.

335 F.3d at 96-97; Pet. App. at 29a-30a (emphasis in original). The District Court made a similar finding and conclusion. *See* 213 F.Supp. 2d at 168; Pet. App. at 48a-49a.[4]

REASONS FOR DENIAL OF THE PETITION

This Court clearly established the rules controlling the applicability of the First Amendment to the selection of charities for inclusion in government-operated workplace charitable campaigns in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). This case presents a straightforward application of *Cornelius* to undisputed facts. *Cornelius* holds that access to a governmental charitable campaign "can be restricted as long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 800 (internal punctuation omitted). Here the Second Circuit and the District Court concluded that the record established that the restrictions, as a matter of fact, satisfied those criteria of reasonableness and viewpoint neutrality. Contrary to the BSA's claim, there is no conflict between the BSA's First Amendment associational rights, affirmed by this Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)("*Dale*"), and the state's right, affirmed in *Cornelius*, to apply reasonable viewpoint neutral criteria to its own workplace charitable campaign. The BSA is free to set its own membership policies, and the state is not attempting to force the BSA to give up its rights. Further, there is no circuit conflict on the issues in this case.

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[4] In footnote 8 of its Petition, the BSA inaccurately states that a participating organization, the Stonewall Foundation, "would exclude from membership and employment persons who espouse the view that homosexuality is immoral." The record does not support that assertion. *See* A-353; Resp. App. 21-A to 23-A.

1. This Court's Decision in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985) Controls The Disposition Of This Case, Making Any Further Review Unnecessary.

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), this Court held that a governmental workplace charitable campaign is a nonpublic forum and further held that the eligibility criteria for participation must be reasonable and viewpoint neutral to avoid violations of charitable organizations' First Amendment rights. There is no other decision of this Court pertaining to governmental charitable campaigns. *Cornelius* provides the appropriate standard by which Connecticut's campaign must be judged.

The Court of Appeals and the District Court both applied *Cornelius* and correctly concluded that (1) the Connecticut Campaign was a nonpublic forum[5] and (2) based on the factual record, its eligibility requirements, including, the mandated non-discrimination policy, were

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[5] Petitioners suggest that the Connecticut Campaign should be viewed as a limited public forum because it "has not reserved the Campaign 'for certain groups or for the discussion of certain topics.'" Pet. at 17, n. 7. Connecticut's Campaign, however, does not differ in any significant way from the federal worksite campaign in *Cornelius*, which this Court determined was a nonpublic forum. As this Court noted, "[t]he government did not create the [federal charitable campaign] for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Cornelius*, 473 U.S. at 805. *See also Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 830 (1995) where this Court cited *Cornelius* as the standard for "forum analysis of [a] charitable contribution program."

reasonable and viewpoint neutral. Because these lower courts reviewed the case under the appropriate precedent and applied the test properly, no further review of this case is warranted.

The petitioners argue that Connecticut's actions violate the "unconstitutional conditions doctrine," as applied in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). In fact, the *Cornelius* test plainly applies here, rather than the unconstitutional conditions test. It would make no sense to say that the state cannot, as a prerequisite for participation in a state charitable campaign, set any condition whatsoever that it could not otherwise constitutionally require of a private organization which was not seeking state support. If that were the rule, the state could not set reasonable viewpoint neutral requirements for participation in charitable campaigns, contrary to the holding of *Cornelius*. At any rate, even if the *Rosenberger* line of cases does apply in this situation, *Rosenberger*, like *Cornelius*, permits viewpoint neutral conditions. The Second Circuit, as noted above, held that Connecticut's Campaign conditions, as a matter of fact, were viewpoint neutral, and therefore also permissible under *Rosenberger*.

Further, the Second Circuit's decision in no way conflicts with this Court's decision in *Dale*. The Court of Appeals clearly recognized the BSA's constitutional right of expressive association to exclude a gay activist from a leadership position. 335 F.3d at 91; Pet. App. at 18a, 19a. The respondents have never tried to prevent the BSA from enforcing its membership or hiring policies. 335 F.3d at 95, n. 8; Pet. App. at 26a, n. 8. The BSA's claim to the contrary; Pet. at 17; is unsupported in the findings of the courts below. Similarly, the BSA's bald claim that the Court of Appeals' decision permits "indirect interference with rights of expressive association" in contravention of

Dale is unsupported. The BSA fails to cite to any part of the *Dale* decision to establish this contention. *See, e.g.*, Pet. at 11.

2. There Is No Factual Foundation For BSA's Claim Of Viewpoint Discrimination.

The BSA insists it was excluded from the Campaign because of its "constitutionally protected views and membership policies." Pet. at 11. While the petitioners continue to make this assertion, the Second Circuit found that "the BSA has not presented *any* evidence of viewpoint discrimination." 335 F.3d at 98; Pet. App. at 32a (emphasis added). The Court scrutinized the procedures applied to the determination to exclude the BSA, including the declaratory ruling proceedings at the CHRO, and concluded that the BSA's claims of a biased procedure "are purely speculative," that its evidence was "insufficient" and that it had "adduced no evidence that the hearing was fast-tracked" to precede this Court's issuance of its opinion in *Dale*. 335 F.3d at 96; Pet. App. at 28a.

As to the BSA's claim that the respondents removed it on the basis of its discriminatory practices while inconsistently allowing other alleged discriminators to remain in the Campaign, the Court reviewed the evidence in the record and concluded, "[t]he BSA, however, has presented no evidence that meets this description." 335 F.3d at 96; Pet. App. at 29a. The Court based this determination on its review of the 17 organizations, out of the 900+ appearing in the Campaign directory, which the BSA singled out as entities that practiced discrimination. 335 F.3d at 95-97; Pet. App. at 27a-30a; n. 10. While the Court observed that these agencies "appear to target their *services* to persons of specific races, ethnicities, sexes, ages or sexual orientations," the Court correctly observed that the BSA presented "no evidence that these groups actually

have policies of discrimination or do discriminate in the provision of services. More significantly, the BSA fails to point to the slightest indication that these groups discriminate in their *membership or employment policies*, as opposed to their policies in providing services." 335 F.3d at 96; Pet. App. at 29a (emphasis in original).

In sum, the Court of Appeals decision is strongly and clearly grounded in the detailed factual determinations made by that court.

3. There Is No Conflict With A Decision From Any Other Circuit.

There is no conflict between the decision below and a decision of any other court of appeals on the issue in this case, the application of the First Amendment to a workplace charitable campaign. The sole case on point is *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), and it is that opinion which the Second Circuit and District Court squarely followed.

Petitioners attempt to manufacture a conflict between the Second Circuit decision in this case and decisions in other circuits.[6] The cases they rely on are inapposite. In *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001), the Ku Klux Klan applied to participate in Missouri's Adopt-A-Highway program and was excluded. The state program was clearly a public forum, although the

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[6] The BSA also relies on district court and state court cases (Pet. at 23-25) to press its position that a conflict exists among the *circuits*. The cases cited are either consistent with the instant case and also rely on the analysis of *Cornelius*, the controlling precedent, or are factually distinct as to the type of forum under consideration.

Eighth Circuit neglected to say so. Further, contrary to the facts here, the *Cuffley* court made an actual finding that the state's purported "reasons for denying the Klan's application are so obviously . . . pretextual that . . . we are left only with the admitted reason . . . that the state disagrees with the Klan's beliefs and advocacy." *Id.* at 711. In other words, the *Cuffley* Court made a factual finding that the claimed viewpoint neutral actions of the state were a facade for discrimination. The BSA also erroneously relies on the public forum case, *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978), involving the use of public school facilities. The Fifth Circuit did not address the constitutional issue on the merits and, in fact, remanded the case for more fact finding. But more importantly, in that case, in contrast to Connecticut's, the state court noted that the state admitted that it was barring a group because of its *advocacy* of racial and religious discrimination. *Id.* at 1125.

Petitioner's reliance on *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003); *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) and *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997), to show circuit conflicts is even more tenuous. In each of those cases, the court found as fact that the government had engaged in viewpoint discrimination. While the outcomes of those cases were different than this case, there is no conflict among the circuit courts because the analyses are consistent with that of the Second Circuit.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

RESPONDENTS

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APPENDIX

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STATUTORY PROVISIONS

§ 5-262. State Employee Campaign. Deduction of contributions. Regulations. (a) As used in this section:

(1) "Federation" means a community chest or other organization which is incorporated as a nonstock corporation, is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended and consists of not less than ten affiliated agencies conducting a single, annual, consolidated effort to secure funds for distribution to its member agencies engaged in charitable and public health, welfare, environmental, conservation or service purposes.

(2) "Agency" means an organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended.

(3) "State Employee Campaign" means an annual campaign to raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes.

(b) There is established a State Employee Campaign Committee consisting of: The Comptroller, or his designee; the Commissioner of Administrative Services, or his designee; the executive director of the Joint Committee on Legislative Management, or his designee; ten state employees appointed as follows: Four by the Governor, two of whom shall be a representative of organized labor, one by the speaker of the House of Representatives, one by the majority leader of the House of Representatives, one by

the minority leader of the House of Representatives, one by the president pro tempore of the Senate, one by the majority leader of the Senate and one by the minority leader of the Senate; two retired state employees, one appointed by the Governor and one appointed by the Comptroller; one nonvoting representative from each participating federation; and one nonvoting representative from the principal combined fund-raising organization selected pursuant to subsection (c) of this section. Not more than one state employee from any state agency shall be appointed to the committee. All voting members of the state employee campaign committee and their successors shall serve in accordance with the provisions of section 4-1a. The committee shall select one of its voting members to serve as chairperson.

(c) The State Employee Campaign Committee shall select a federation which has participated in the State Employee Campaign and has workplace campaign experience to administer the State Employee Campaign and shall supervise the campaign activities of such federation. The federation selected shall be referred to as the "principal combined fund-raising organization". If two or more federations request that the State Employee Campaign Committee select them to serve as the principal combined fund-raising organization, the State Employee Campaign Committee shall select a federation through a competitive process. During the fiscal year ending June 30, 1993, the committee shall also conduct a comprehensive review of the State Employee Campaign. Not later than July 1, 1993, and annually thereafter, the committee shall submit to the Governor and the General Assembly a report on the results of the most recently completed State Employee Campaign and recommendations for improvements in the upcoming campaign.

(d)(1) Each federation which did not participate in the most recently completed State Employee Campaign shall apply to the State Employee Campaign Committee not later than January fifteenth annually for approval to participate in the campaign. Such application shall contain information required by regulations adopted by the office of the Comptroller in accordance with chapter 54. The committee shall review such application and notify the federation of its decision not later than May fifteenth. A federation whose application is denied may appeal the decision of the committee in accordance with the procedures set forth in regulations adopted by the office of the Comptroller.

(2) On or before January fifteenth, each federation which participated in the most recently completed State Employee Campaign shall submit to the State Employee Campaign Committee a letter of intent to participate in the upcoming campaign. On or before April fifteenth, each such federation shall apply to the State Employee Campaign Committee for approval to participate in the campaign. Such application shall contain information required by regulations adopted by the office of the Comptroller in accordance with chapter 54. The committee shall review such application and notify the federation of its decision not later than May fifteenth. A federation whose application is denied may appeal the decision of the committee in accordance with the procedures set forth in regulations adopted by the office of the Comptroller.

(e) The Comptroller, upon written request of any state officer or employee, shall deduct, each pay period, from the salary or wages of such officer or employee the amount of money designated by such officer or employee for payment to the participating federation or federations indicated by the officer or employee. Upon collecting such deductions the Comptroller shall transmit them to the

principal combined fund-raising organization selected pursuant to subsection (c) of this section, together with a list of officers and employees contributing to each federation or its member agencies, provided the identity of officers or employees who have communicated in writing that they desire to remain anonymous shall not be so transmitted. Such organization shall, each month after receiving funds from the Comptroller, distribute the funds among the other federations, for distribution to the member agencies of the federations.

(f) Prior to the state campaign, the principal combined fund-raising organization shall submit for the approval of the State Employee Campaign Committee an itemized budget of anticipated administrative expenses, which shall not include campaign expenses. Following the state campaign, the principal combined fund-raising organization shall recover an amount not to exceed one hundred ten per cent of its preapproved actual administrative expenses from the gross payroll deduction receipts of the campaign in accordance with procedures set forth in regulations adopted by the office of the Comptroller. Undesignated funds raised through the campaign shall be distributed among the participating federations in proportion to the amount of funds designated for each federation.

(g) The principal combined fund-raising organization shall submit to the Auditors of Public Accounts for audit, and a copy to the office of the Comptroller, by March first annually, a financial report of its activities relating to the State Employee Campaign payroll deductions made during the previous calendar year.

(h) The Comptroller shall adopt regulations in accordance with the provisions of chapter 54 to carry out the purposes of this section. The regulations shall set forth

the competitive process by which the State Employee Campaign Committee shall select a federation to serve as the principal combined fund-raising organization and may include criteria for approval of federations applying under this section to participate in the State Employee Campaign.

REGULATIONS

Sec. 5-262-2. General provisions

(a) Participating federations may engage in workplace solicitation of state employees only in accordance with the procedures outlined herein.

(b) Employee solicitations shall be conducted during work hours using non-coercive methods t' at permit voluntary giving and reserve to the individual contributor the right to disclose any gift or keep it confidential.

(c) The solicitation period for the annual SEC shall be scheduled to allow timely processing of payroll deduction requests.

(d) At the discretion of the appointing authority, loaned state employees may volunteer to be assigned on a full or part time basis, for the specific period of time, to conduct or assist in the operation of the SEC. The employing state agency shall decide who will serve as a loaned employee and the length of the assignment. When assigned to the SEC, the loaned stated employee shall retain his salary and benefits.

(e) No federation will be allowed to participate in the SEC unless it and all its member agencies are in, compliance with the requirements of Section 5-262 of the Connecticut General Statutes and Sections 5-262-1 through 5-262-12, inclusive, of the regulations of Connecticut state agencies.

Sec. 5-262-4. Application process

(a) On or before January 15 annually, each federation seeking to participate in the SEC shall submit an application to the SECC c/o the Comptroller. The

application shall be in the form prescribed by the Comptroller and shall contain the following information:

(1) the name, address and telephone number of the federation;

(2) the name, address and telephone number of a person designated by the federation who the SECC may contact regarding the federation application;

(3) a list of member agencies, their telephone numbers and a 25 word description of each agency and the percentage of annual expenditures each agency used for fund-raising and administration;

(4) a document signed by an officer or the executive director of the federation, certifying the following:

(A) that the federation maintains on file the following documents for itself and for each member agency, and that it will produce at the federation's expense any such document(s) upon the written request of the Comptroller, the State Auditors or the SECC:

(i) Articles of Incorporation and current Bylaws;

(ii) evidence of tax exemption under IRS Section 501 (c) (3);

(iii) Certificate of Registration from the Connecticut Department of Consumer Protection, Public Charities Unit or, if exempt, a Certificate of Exempt Status;

(iv) most recent annual financial audit, or financial review, as provided under Section 5-262-3 (e) of the regulations of Connecticut state agencies and IRS Form 990 with all attachments;

(v) most recent annual report;

(vi) a list of officers and directors, giving names, addresses and defined roles;

(vii) a written policy of non-discrimination;

(viii) a statement affirming that there will be no unauthorized use of the SEC contributor lists and that no commissions or bonuses relating to the SEC have been or will be paid;

(ix) a statement affirming that publicity and promotional activities are truthful;

(x) a statement that funds will be used for the stated purposes of the federation and member agencies;

(xi) current operating budget;

(xii) a description of operations and services which includes information on the extent of contributor support and volunteer participation in the activities of the organization.

(B) that the federation and each member agency is in compliance with the eligibility standards set forth in Section 5-262 of the Connecticut General Statutes and Section 5-262-3 of the regulations of Connecticut state agencies.

(C) that the federation shall monitor the compliance of its member agencies and shall inform the SECC as soon as possible if any member agency fails to comply with any of the requirements of Section 5-262 of the General

Statutes or Sections 5-262-1 through 5-262-12, inclusive, of the regulations of Connecticut state agencies.

(D) that the federation and each member agency is up to date in its filing of annual financial reports required by state law.

(E) that the federation will maintain all documents listed in subsection (A) for a minimum of 3 years after the end of the fiscal year to which such document relates.

(b) The SECC shall select a committee comprised of three or more voting members ("the application review committee") which shall review all applications for completeness and for compliance with eligibility standards. The application review committee may request documents or information pertinent to its review from the applicant federation and from any member agency. The application review committee shall make its recommendations to the SECC. The SECC shall vote on each application and notify each federation of its decision in writing no later than April 15.

(c) Any federation whose application has been denied may request a hearing before the SECC to appeal the denial of its application. Such request for a hearing shall be in writing, and filed with the SECC within fifteen (15) days of receipt of the notice of denial. The SECC shall promptly schedule a hearing, and may request the federation to produce documents or information pertinent to the application and appeal. The SECC shall issue a decision on the appeal within 21 days of the hearing. The decision shall be in writing and shall state the reason(s) for its decision. The decision of the SECC shall be final.

Sec. 5-262-5. Withdrawal of eligibility

(a) In the event that a participating federation or member agency fails to adhere to the eligibility requirements or to the policies and procedures of the SEC, eligibility of such federation or agency may be withdrawn by the SECC. The SECC shall send written notification to the federation and agency of the specific reasons for the withdrawal of eligibility.

(b) The federation or agency or both may appeal the withdrawal of eligibility by filing a written appeal with the SECC within ten (10) working days after receipt of such notification. The SECC shall provide the appealing federation or agency a hearing within ten (10) working days of the receipt of the notice of appeal, unless by mutual consent the parties agree to a different date for such hearing. The SECC may request the federation or agency to produce documents or information pertinent to the appeal. The SECC shall issue a decision on the appeal within 21 days of the hearing. The decision shall be in writing and shall state the reason(s) for its decision. The decision of the SECC shall be final.

(c) If a member agency's eligibility to participate in the SEC is withdrawn by the SECC, the federation may not distribute any funds raised in the SEC to such agency.

Q That Sunday was Mother's Day and then on Monday, May 15th these letters were sent to the various United Way organizations, correct?
A Correct.
Q The letters that went out, the purpose of these letters were to notify the United Way organizations that the committee was denying the application to participate in the year 2000 campaign with respect to the participation of the Boy Scouts of America?
A Correct.
Q When did the committee make that decision?
A In fact the committee had not met yet. We didn't meet until after the fact on this.
Q So is it fair to say that on May 15, 2000, the committee had not yet decided to deny the applications of the United Way organizations with respect to the participation of the Boy Scouts of America?
A Correct. The committee did not meet on this yet. It was sent out prior to our meeting. We met after the fact.
MR. ROTHMAN: Make a note that counsel is conferring with the witness.

BY THE WITNESS:
A It was ratified after the fact. Just so you have that information.
Q Aren't you running a risk that the committee will reach a contrary decision?
A Sure.
Q What would you have done if that happened?
A Whatever the committee ruled and what the committee decided.
Q But did you expect the committee to ratify this letter?
A Yes, I would say I believed they would.
Q Why did you expect them to do that?
THE WITNESS: Excuse me.
MR. ROTHMAN: Would you indicate that the witness is conferring with counsel.
BY THE WITNESS:
A The-- I conferred with our legal counsel regarding this letter. We had a deadline date of May 15th in which we had to notify the charities if they are not being allowed into the campaign. So we had to send the notification out by May 15th to make that deadline.

Q When did you confer with counsel?
A I don't remember if it was the 12th or the 15th. I'm not really sure. I don't remember.
Q Was it after the commission's ruling?
A Yes. Because if I remember correctly, I don't think they initially sent a copy to me.
Q How did you learn about the commission's ruling?
A I believe I got a call from our attorney to tell us the decision was out.
Q You are referring to Mr. Prensky?
A Mr. Prensky, yes.
Q When did you receive that call?
A I don't remember if it was the 12th or 15th. I don't remember the timing on that.
Q What is the basis of that May 15 deadline that you mentioned?
A I remember having to look at them at the time, but we-- there's a deadline of when all the applications have to be in, there's a deadline as to when we review the applications and there's a deadline as to when we have to send the letter out informing them if they are not-- if any of the federations-- informing the

federations if they or their member charities aren't going to make it into the campaign and May 15th was the deadline for that.

Q Prior to May 15th, 2000, had the committee discussed what action it would take in response to the CHRO's ruling?

A No, I don't recall that we did. But I'm not sure.

Q When you sent out this letter on May 15th, were you concerned that the committee might not ratify the letter?

A No. At the time I don't believe I even thought that there was anything else to do but to get the letter out in time. I wasn't even thinking about what the committee would think after the fact.

Q Were you concerned that the committee might decide to allow the Boy Scouts of America to participate in the campaign?

A No, I didn't even think about that one way or the other.

Q Did you think based on the committee's May 12th decision that the campaign was obligated to exclude the Boy Scouts from the campaign?

A After conferring with our legal

Q Do you need to have the question read back?
A No. The question was clear to me, I just needed to make sure I wasn't violating any attorney-client privilege.
But it was based-- the answer to that is it was based on the advice of our attorney, Bill Prensky.
Q What Mr. Prensky advised you after May 12th was that you were bound by the CHRO's ruling?
MR. PRENSKY: I'm going to direct her not to respond based on the attorney-client privilege.
MR. ROTHMAN: Why don't we mark this as Plaintiff's Exhibit 64 (sic) a copy of the action summary from the May 22nd, 2000 meeting.
Exhibit 66.
(Plaintiff's Exhibit 66 was marked for identification: Action summary of May 22, 2000.)
BY MR. ROTHMAN:
Q Do you recognize Plaintiff's Exhibit 66 as the action summary from the May 22nd, 2000

committee meeting?
A Yes, it was a special meeting. Yes, I do.
Q Was a special meeting called for the purpose of discussing the May 15 letter?
A Correct.
Q Just to clarify for the record, the May 15 letter was marked as Plaintiff's Exhibit 59.
A Okay. Yes.
Q You need to give an audible response so that the court reporter can take it down.
A Okay.
Q At this meeting you told those present that Attorney Prensky had told you that the committee was bound by the CHRO ruling and that it was necessary to notify the Boy Scouts that they were denied participation in the campaign.
A That's correct.
Q There was a motion made to ratify the May 15 letter?
A Correct.
Q Motion was withdrawn so that the committee could seek legal advice?
A Correct.

Q When was the May 15, 2000 letter ratified?
A I don't remember the date. It was after this, though. I don't recall the date.
Q Was it ratified?
A Yes.
Q Did you say anything else regarding the Boy Scouts letter and the CHRO declaratory ruling?
A I don't recall anything other than what's here.
Q What concerns were voiced that led to the motion being withdrawn?
A The concern that was voiced was the fact that they wanted legal counsel present for the whole discussion so that they could ask questions if they had any.
Q Was that the only concern that was voiced?
A Pretty much, from what I recall. It was just that they wanted to be able to hear everything that was said and ask a question if it came up rather than asking it-- have it be asked somewhere and then come back and give the information. They wanted to be able to be there

so other questions can be voiced. As one person thinks of a question, sometimes somebody else thinks of another one because of the first question asked. So they wanted to have legal counsel present for the whole thing.

Q Were you concerned that the ratification of your May 15 letter was being put off until another day?

A I knew at some point we would come to a decision one way or the other, so I wasn't concerned. Either they ratified it or they didn't. I knew the vote would come at some point, so I wasn't really overly concerned about it.

Q Or did you think there was-- did you think there was a possibility that the committee would vote not to ratify your letter?

A I knew there was a possibility, sure. I mean a vote can go either way. People either vote for something or vote against it.

Q What would have been the effect on the campaign if having sent the letter on May 15, it was then not ratified at some-- some time in June?

A We would have just sent out another

So in May of 2000, the United Way was collecting for the campaign, the 1999 campaign deduction-- payroll deductions; is that correct?

A That would be correct.

Q So to back up, the committee, did it not vote to drop the Boy Scouts from the 2000 campaign?

A Correct.

Q Did the committee take any action with regard to the 1999 campaign which was being collected in May 2000 when these e-mails were written?

A I don't believe so.

Q They took no action with regard to the ongoing campaign; is that correct?

A Yeah, I don't believe we did anything at all--

MR. ROTHMAN: I object to the-- leading the witness. It's almost as if you are testifying. I mean it's okay if you want to establish some preliminary things, but I think it's improper to lead her once you've had that established.

MR. PRENSKY: That's on the record.

MR. ROTHMAN: Why don't we take a one minute break.

(Recess taken at 12:29 p.m.
Reconvened at 12:30 p.m.)

BY MR. ROTHMAN:

Q As far as you are aware, has NARAL ever accepted a member who was opposed to abortion rights?

A I don't know.

Q Has the Stonewall Foundation ever except a member who was opposed to gay or lesbian rights?

A Not knowingly.

Q If they knew, they wouldn't accept that person as a member?

A We wouldn't include that person in our activities speaking or educating the public.

Q Would you accept that person as a member of the Stonewall Foundation?

A The membership in Stonewall Foundation is not clearly defined, so I'm hesitating to answer that question. Membership in the--

Q But you wouldn't let that person participate in the activities conducted by the Stonewall Foundation?

A We wouldn't let that person speak or represent the Stonewall Foundation, if they were put on a public forum or event, we would have no restrictions or limits on who would attend.

MR. ROTHMAN: I have no further questions.

Ms. Parker and Mr. Prensky have a right to ask questions as does your own counsel should any of them choose to.

MS. MURPHY: I just want to clarify, just for the record, that Ms. Brett is not a plaintiff in the Cornerstone Pool case. She's a complainant at the CHRO level. There is a Superior Court case in which all of the complainants are defendants. I just want to clarify that for the record. I have no questions.

CROSS-EXAMINATION

BY MS. PARKER:

Q I have just a few questions. Ms. Brett, when you were a commissioner, when would Commission, as a body, approve minutes from previous meetings?

A At a subsequent commission meeting.

Q You testified earlier about State

Pride, does that organization exclude heterosexuals from membership?
A No, actually, it doesn't.
Q Does Stonewall Foundation exclude heterosexuals from membership?
A No.
Q Does the Connecticut coalition for lesbian, gay, bisexual, transgender civil rights exclude heterosexuals from membership?
A No.
Q Do any of the other groups that you've identified earlier in your testimony as lesbian and gay groups exclude heterosexuals from membership?
A No.
MS. PARKER: I have no further questions.
CROSS-EXAMINATION
BY MR. PRENSKY:
Q Actually, I do have a couple questions. Ms. Brett, when you were commissioner at the CHRO, were the regular meetings of the Commission open to the public?
A Yes.
Q You just testified that at the regular